FAN YEW TENG v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) July 16, 1975]
[Kuala Lumpur — Federal Court Criminal Appeal No. 1 of 1975]

Criminal Law and Procedure — Sedition — Freedom of Speech — Seditious tendency — Whether speech has tendency to excite disaffection — Earlier conviction quashed — Retrial — Sedition Act, 1960, ss. 3 and 4 — Criminal Procedure Code (F.M.S. Cap. 6), s. 302(i) — Federal Constitution, arts. 7(2), 150(2) and 153.

Constitutional Law — Power of Yang Dipertuan Agung to issue Ordinances — Dissolution of Parliament during emergency — Federal Constitution, arts. 7(2), 150(2) and 153.

This was an appeal from the decision of Abdul Hamid J. (reported in [1975] 1 M.L.J. 176). The main grounds of appeal raised were:—

(1) that having regard to what happened earlier and in particular to the fact that no retrial was ordered when the earlier conviction of the appellant was quashed, the retrial of the appellant and his conviction were a nullity;

(2) as no written consent of the Public Prosecutor was produced when the appellant's plea to the charge was recorded at the beginning of the retrial in the High Court, the retrial was a nullity;

(3) that the Yang Dipertuan Agung had no power to issue Ordinances under Clause (2) of Article 150, as there was no Parliament in being, and therefore the appellant's conviction under an amendment affected by Ordinance 45 which was void was itself void;

(4) the appellant was given insufficient particulars of the offence alleged against him and the charge was therefore bad in law;

(5) it had not been proved that the appellant was the publisher of the offending article;

(6) the learned judge was wrong in holding that it was immaterial whether the offending article was true or false;

(7) the article complained of was not seditious;

(8) the sentence imposed on the appellant was excessive.

Held, dismissing the appeal: (1) as the appellant's earlier trial had been declared a nullity, his purported conviction at that time was also a nullity and he was therefore not a person who has been convicted of an offence within the meaning of Clause (2) of Article (7) of the Federal Constitution. The retrial and conviction were not in contravention of that clause and were perfectly valid;

(2) as the consent of the Public Prosecutor had been obtained before the warrant of arrest against the appellant was applied for and as it was produced at the preliminary inquiry, it could not be said that the appellant was prosecuted for an offence under section 4 of the Sedition Act, 1960, without the written consent of the Public Prosecutor;

(3) the amending Ordinance, Ordinance No. 45, was validly made by the Yang Dipertuan Agung, as Parliament was not sitting at the relevant time;

(4) the charge was not defective, as in a prosecution under section 4(1)(c) of the Sedition Act, it is unnecessary for the Public Prosecutor to specify in the charge on which of the six tendencies set out in section 3(1) he relies and it is open to him during the course of the trial to pick and choose;

(5) the appellant had in fact admitted that he was the publisher of the offending article and the evidence showed that the appellant had taken an active part in arranging for the publication of the article;

(6) since the amendment to the Sedition Act by Ordinance 45, sub-section (2) of section 3 of the Act is nugatory to all intents and purposes and the test to be applied is whether or not the article complained of has in fact a seditious tendency. It is immaterial whether the words complained of are true or not;

(7) the speech which was reported in the article taken as a whole cannot escape being regarded as expressing sentiment expressive of a seditious tendency and the article was therefore seditious;

(8) there was no reason in this case to disturb the sentence imposed by the learned judge.

Cases referred to:-

(1) *Delhi Administration* v. *Ram Nath Aggarwal* [1969] Cr. Law Journal 1279.
(2) *Ukha Kolhe* v. *The State of Maharashtra* A.I.R. 1963 S.C. 1531.
(3) *Chong Chee Pak* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 45.
(4) *Cheah Yew Fatt* v. *Public Prosecutor* [1960] M.L.J. xlvi.
(5) *Sau Soo Kim alias Tai Tau Chye* v. *Public Prosecutor* [1975] 2 M.L.J. 134.
(6) *Perumal* v. *Public Prosecutor* [1970] 2 M.L.J. 265.
(7) *Haji Mohamed Paiman* v. *Public Prosecutor* [1966] 1 M.L.J. 58.
(8) *Ng Yan Pee* v. *Public Prosecutor* (1959) 3 M.C. 249.
(9) *Abdul Hamid* v. *Public Prosecutor* [1956] M.L.J. 231.
(10) *Public Prosecutor* v. *Oie Hee Koi and Associated Appeals* [1968] 1 M.L.J. 148.
(11) *Jaswant Singh* v. *State of Punjab* A.I.R. 1958 S.C. 124.
(12) *Melan bin Abdullah & Anor.* v. *Public Prosecutor* [1971] 2 M.L.J. 281.
(13) *Lim Beh* v. *Opium Farmer* (1842) 3 Ky. 10, 12.
(14) *Public Prosecutor* v. *Lee Pak* [1937] M.L.J. 265.
(15) *Pek Tin Shu* v. *Public Prosecutor* [1948] M.L.J. 110.
(16) *Queen Empress* v. *Amba Prasad* (1898) I.L.R. 20 All. 55, 69.
(17) *R.* v. *Sullivan* (1868) 11 Cox C.C. 44, 45.

FEDERAL COURT.

Karpal Singh (*G. Davidson*) with him for the appellant.

Abdullah Ngah (Senior Federal Counsel) for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering judgment of the Court): This is an appeal from the judgment of Abdul Hamid J. convicting the appellant on the following charge: —

"That you, in or about the month of December, 1970, in Petaling Jaya, Selangor, published a seditious publication, to wit, an article under the caption 'Alliance policy of segregation "Evidence galore" listed by Dr. Ooi' appearing at page 8 of the December 1970 issue of the 'Rocket' (English Edition), the official organ of the Democratic Action Party, (the full text of which is attached herewith as schedule 'A' to this charge), and you have thereby committed an offence punishable under section 4(1)(c) of the Sedition Act, 1948 (Revised — 1969)."

The full text of the article referred to in the charge was reproduced in full in the judgment of the learned trial judge which has been reported in [1975] 1 M.L.J. at page 176 and there is therefore no need for us to reproduce it.

The first ground of appeal is that, having regard to what happened earlier, the retrial of the appellant and his conviction are a nullity. To understand this ground of appeal, it is necessary to mention the history of this matter.

Originally, the appellant was charged with the same charge together with Dr. Ooi and two others. He was convicted by Raja Azlan Shah J. (as he then was), see [1971] 2 M.L.J. 108. On appeal by the appellant (Dr. Ooi and the others did not appeal), this court quashed the appellant's conviction on the ground that his trial at the High Court had not been preceded by a preliminary enquiry before a magistrate as required by section 138 of the Criminal Procedure Code and was, therefore, a nullity, see [1971] 2 M.L.J. 271. The decision of the Federal Court declaring the trial

a nullity was confirmed by the Privy Council, see [1973] 2 M.L.J. 1.

Subsequently, the appellant was rearrested and charged with the same offence. This time there was a preliminary enquiry before his trial in the High Court before Abdul Hamid J. It was against the conviction and sentence at the retrial that this appeal has been lodged.

When declaring the earlier trial a nullity, the Federal Court did not, however, order a retrial. It was accordingly argued before us that as, in the words of clause (2) of article 7 of the Constitution, "a person who has been ... convicted of an offence shall not be tried again for the same offence, except where the conviction ... has been quashed *and a retrial ordered* by a court superior to that by which he was ... convicted", the appellant should not have been tried again and that his retrial was in contravention of the protection afforded to him by the Constitution. Mr. Karpal Singh, learned counsel for him, cited the following cases: —

Delhi Administration v. *Ram Nath Aggarwal*;[1] *Ukha Kolhe* v. *The State of Maharashtra*;[2] *Chong Chee Pak* v. *Public Prosecutor*[3] and *Cheah Yew Fatt* v. *Public Prosecutor*.[4]

Mr. Karpal Singh claimed that of the two local cases which were both against him the first was decided before the Constitution came into force and that in the second, though decided after the Constitution had come into force, article 7(2) had not been brought to the court's attention, and that, therefore, these two cases were not material to his argument.

As regards section 302(i) of the Criminal Procedure Code which reads: —

"A person who has been tried by a court of competent jurisdiction for an offence and convicted ... of such offence shall, while such conviction ... remains in force, not be liable to be tried again for the same offence....",

and which seems to imply that a person who has been tried and convicted by a court of competent jurisdiction for an offence, may be tried again for the same offence if the conviction is no longer in force, Mr. Karpal Singh submitted that that section did not use the same language as article 7(2) and that, therefore, it bore a different meaning.

In reply, learned Federal Counsel cited a recent decision of this court, *Sau Soo Kim @ Tai Tau Chye* v. *Public Prosecutor*,[5] in support of his argument that, though this court when quashing the appellant's conviction, did not order a retrial, nevertheless the appellant could have been legally retried.

In our judgment as the appellant's earlier trial was declared a nullity, no order made in such a trial would have any effect and he was never in jeopardy, his purported conviction at that trial was also a nullity; therefore, he is not a person who has been convicted of an offence within the meaning of clause (2) of article 7. In other words, as the trial was a nullity there was in fact no trial so that the trial court could neither convict or acquit. The learned judge was right to overrule the submission that the appellant should not be tried again and proceeded to hear the case. Accordingly, his retrial and conviction were not in contravention of that clause and, therefore, perfectly valid.

The second ground of appeal is that, as the written consent of the Public Prosecutor as required by section 5(1) of the Sedition Act had not been shown to have been obtained before the warrant to arrest the appellant was procured or alternatively, as the written consent had not been produced when the appellant's plea to the charge was recorded at the beginning of the retrial in the High Court, the retrial was, therefore, a nullity.

That section reads: —

"No person shall be prosecuted for an offence under section 4 without the written consent of the Public Prosecutor...."

Mr. Karpal Singh cited *Perumal* v. *Public Prosecutor*,[6] *Haji Mohamed Paiman* v *Public Prosecutor*[7] and *Ng Yan Pee* v. *Public Prosecutor*.[8] He further argued that the evidence of A.S.P. Shingara Singh showed that he applied for a warrant against the appellant after receiving a *sanction* from the Attorney-General; that a sanction was not "written consent" as required by section 5; and that on the authority of *Abdul Hamid* v. *Public Prosecutor*,[9] a sanction was no evidence of consent. Mr. Karpal Singh submitted that the learned judge was wrong in holding on the authority of *Public Prosecutor* v. *Oie Hee Koi and Associated Appeals*,[10] a Privy Council decision, that the absence of the written consent of the Public Prosecutor was cured by the presence of his deputy who personally conducted the prosecution. He stated that the prosecution in question before the Privy Council was under the Internal Security Act, which spoke of mere consent, not written consent. He cited an Indian Supreme Court decision, *Jaswant Singh* v. *State of Punjab*[11] as authority for the proposition that provisions regarding sanctions must be observed with *complete* strictness.

In our judgment, there is no merit in this argument, for (a) the unchallenged evidence of the A.S.P. already mentioned was that he received a sanction from the Attorney-General before applying for a warrant of arrest against the appellant, and (b) we have seen Exhibit P1 produced at the preliminary enquiry. It is a written *consent* of the Public Prosecutor to the prosecution of the appellant. As it was produced at the preliminary enquiry, legally it was unnecessary to produce it at the trial in the High Court, though it would have been more convenient if that had been done. In the circumstances, it is not true to say that the appellant was prosecuted for an offence under section 4 without the written consent of the Public Prosecutor.

The third ground of appeal related to clauses 1 and 2 of article 150, which read: —

"(1) If the Yang Dipertuan Agung is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a proclamation of emergency.

(2) If a proclamation of emergency is issued when Parliament is not sitting, the Yang Dipertuan Agung shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required."

As we all know, Parliament was dissolved on March 20, 1969, a general election to the House of Representatives and to all State Legislative Assemblies

was held on Saturday, the 10th of the following May, most of the results were announced on the Sunday and two days later on 13th May riots broke out in Kuala Lumpur and in other places. Two days after the outbreak of violence the Yang Dipertuan Agung proclaimed a state of emergency under article 150, see P.U.(A) 145/69. At the same time, acting under clause (2) of that article, he promulgated the Emergency (Essential Powers) Ordinance, 1969, (P.U.(A) 146/69) giving himself wide powers for securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community. By section 7 thereof he suspended all elections to the House of Representatives and to all State Legislative Assemblies that had not been completed.

On August 3, 1970, His Majesty promulgated the Emergency (Essential Powers) Ordinance No. 45/1970 (P.U.(A) 282/70 which came into force on August 10, 1970) and pursuant to it the Sedition Act was amended. There is a lucid account of the amendments in the judgment of Ong C.J. (Malaya), in *Melan bin Abdullah and Another* v. *Public Prosecutor*[12] and there is no need for us to deal with them here.

Mr. Karpal Singh conceded that the proclamation of emergency was valid as undoubtedly His Majesty had to proclaim an emergency at that time, but, however, argued that because of the words "when Parliament is not sitting" in that clause (2) of article 150 it is clear that that clause envisages the existence of a Parliament which is in being and one which had not been dissolved, and that as the previous Parliament had been dissolved and elections to the new Parliament had not been completed, there was then no Parliament in being, and that as there was no Parliament in being, His Majesty had no power to issue Ordinances under clause (2), and that, therefore, the appellant's conviction under an amendment effected by Ordinance 45 which is void is itself void.

With all due respect we do not agree. In our opinion, the words "when Parliament is not sitting" in clause (2) mean not only "when Parliament which is in being is not sitting", but also "when Parliament has been dissolved and the general election to the new Parliament has not been completed." Such being our opinion, it is unnecessary to deal with Encik Abdullah's contention that Parliament was still in being because the general election had been completed on July 4, 1970 and that, therefore, it was in being when Ordinance 45 was published on August 3, 1970.

The fourth ground of appeal is that the appellant was given insufficient particulars of the offence alleged against him and, therefore, the charge was bad in law. Mr. Karpal Singh argued that as section 3(1) of the Sedition Act specifies six different kinds of seditious tendencies, the prosecution should have specified in what way the publication complained of was seditious, and that the failure of the prosecution to do so embarrassed the appellant and rendered the charge bad in law. He referred to a specimen charge at page 317 of *Ratanlal's* Law of Crimes, 22nd edition, under section 124A of the Indian Penal Code. He also cited *Lim Beh* v. *Opium Farmer*,[13] *Public Prosecutor* v. *Lee Pak*[14] and *Pek Tin Shu* v. *Public Prosecutor*.[15]

With all due respect, we do not think that there is any merit in this argument. The forms of charges set out in *Ratanlal's* Law of Crimes merely serve as a general guide and bear no relation to any particular set of facts. The offence of murder is committed only if there was present intention or knowledge of the kinds mentioned in sections 299 and 300 of the Penal Code, and yet when a person is charged with murder, it is unnecessary for the prosecution to specify in the charge the particular intention or knowledge set out in the two sections on which it relies, and indeed it can shift its ground during the course of the prosecution. In our judgment, in a prosecution under section 4(1)(c) of the Sedition Act, it is equally unnecessary for the Public Prosecutor to specify in the charge on which of the six tendencies set out in section 3(1) he relies and that it is open to him during the course of the trial to pick and choose.

The fifth ground of appeal is that the Public Prosecutor has not proved that the appellant was a publisher of the offending article. He submitted that the words "prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication" in section 4(1)(c) suggest that the word "publishes" must necessarily imply that the Public Prosecutor must prove that the accused was a publisher. He pointed out, quite correctly, that the application for a permit under section 7(1) of the Printing Presses Ordinance, 1948, to publish the "Rocket" mentioned that the proposed publisher was not simply the appellant, but the appellant "for the Party" (page 100 of the appeal record), that the approval of the application at page 102 was addressed to Mr. Lee Lam Thye, not to the appellant, that the permits (pages 103, 104, 105 and 106) were granted to the Democratic Action Party, Malaysia, not to the appellant, and that the publisher's name as given at page 8 of the offending magazine was given as the Democratic Action Party, Malaysia, not the appellant. Accordingly, it was argued that the appellant should not have been charged in the first place.

With respect we do not see any merit in this argument. The word "publishers" is not defined by the Act. Therefore, the court should give it its ordinary dictionary meaning of "making generally known, noising abroad, issuing copies for sale to the public." Here there was clear evidence that the appellant took an active part in arranging for the offending article to be published in the "Rocket", as can be seen from the evidence of the printer, and that the "Rocket" though a Party newspaper, was available for sale to the public. In answer to a question during cross-examination, appellant did not deny publication and he in fact admitted before the learned judge that he was the publisher.

The sixth ground of appeal is that the learned judge was wrong in holding on the authority of *Queen Express* v. *Amba Prasad*[16] that it is immaterial whether the offending article was true or false. With respect we agree with Ong C.J. in *Melan Abdullah*[12] that since the amendment by Ordinance 45, subsection (2) of section 3 of the Sedition Act is now nugatory to all intents and purposes and that it simply lays down that the test to be applied is whether or not the article

complained of has in fact a seditious tendency. In other words, we agree that the law is such that it is immaterial whether the words complained of are true or not.

The sixth ground of appeal is that the article complained of is not seditious. There is no merit in this ground. Two judges have come to the conclusion that the article was seditious. We see no reason to differ from them. The article is in respect of a speech delivered by Dr. Ooi Kee Saik on an occasion to celebrate the release from detention of Encik Lim Kit Siang. It is quite obvious the occasion was used not so much to celebrate the release as to launch an attack on the Alliance Government for their alleged partiality in favouring a particular group of citizens. This is clearly shown by the six instances given to illustrate the partiality. The allegation made during the emergency and shortly after the "May 13" incident is unwise and an important factor to be taken into consideration. This, apart from the time factor, in a plural society, is a dangerous allegation tending not only to incite disaffection against the Government, but also to promote feelings of ill-will and hostility among the races in the country. Allegations of partiality cannot all be true. For instance, in the High Court in Borneo, out of five judges only one is a Malay. In the Federal and in Sabah and Sarawak cabinets there are sufficient major racial representations to rebut allegations of partiality. That the Yang Dipertuan Agung is to safeguard the special position of the Malays and the Natives in Sabah and Sarawak and the legitimate interest of other communities is clearly spelt out in Article 153 of the Federal Constitution. These provisions cannot be questioned and are necessary to assist the less advanced or fortunate in the light of the conditions prevailing in the country at the time of independence. It may take time, certainly not in our generation, for the provisions to become redundant. But, as long as the provisions are there it is mischievous to seek to attack the Government for doing something in accordance with the Constitution.

In any civilised society there must be law and order which are the prerequisites to the advancement of harmonious living and human happiness. It is important to bear in mind that Malaysia has a plural society. Therefore, it is the primary and fundamental duty of every Government to preserve law and order. It is in connection with this function of the Government that the offence of sedition must be looked at. Thus, acts, speeches, words or publications constitute sedition if they have a 'seditious tendency' as defined by the provisions of section 3 of the Act. It is, therefore, not difficult to see why they would be regarded as seditious if they seek to bring the Government into hatred or contempt or to excite disaffection against the Government; or to promote feelings of ill-will and hostility among races or classes of population in the country.

Mere criticism of Government is not sufficient to constitute sedition. In a parliamentary democracy constructive criticism is always welcomed by the Government of the day. Honest and reasonable criticism is a source of strength to the country rather than a weakness. There is nothing to prevent a person criticising the system of Government or expressing a desire for a different system of Government. However, such criticism must be made without infringing the law of the country.

In the second half of the 19th century, Fitzgerald, J. in *J.* v. *Sullivan*[17] discussed sedition and stated: —

> "Sedition ... embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder."

The speech taken as a whole cannot escape being regarded as expressing sentiment expressive of a seditious tendency. The Government of the day has an overwhelming majority in Parliament and it is immaterial that the speech is unlikely to cause the Government any uneasiness. In another country the speech may not be thought to have exceeded the limits of comments or criticism. We are not, however, concerned with any other country. We have to remember in our country we have a plural society. Within that society there are differences in origin, culture, religion and so forth. We have built a country out of diversities. It is in diversities that we try to achieve unity. Therefore, anything done or said to dislocate that unity cannot be taken lightly. No one likes to see a repetition of the "May 13" incident. One would have thought that so soon after that incident and during an emergency any responsible politician would steer clear of any issue which smacks of racialism in trying to score a political advantage.

The last ground is that the sentence is excessive. In deciding appropriate sentence the first and foremost consideration is the public interest. The law does not fix the sentence for a particular offence but fixes a maximum sentence and leaves it to the trial court to decide what is, within that maximum, the appropriate sentence in the particular circumstances of each case. Therefore, before passing sentence the trial court hears evidence of antecedents and character of every convicted person. In this case the learned judge took into consideration all that could be said in favour of the appellant. He thought a fine would be sufficient in this instance. An appellate court would be slow to interfere with sentence unless the trial court has erred in principle and the sentence is inappropriate in the circumstances. In this case there is no reason for us to disturb the sentence imposed by the learned judge.

The result is that we would dismiss the appeal both against conviction and sentence.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*